

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----
4 August Term, 2007

5 (Argued: June 2, 2008

Decided: August 4, 2008)

6
7 Docket No. 06-0339-cr

8 -----X
9 UNITED STATES OF AMERICA,

10
11 Appellee,

12
13 - v. -

14
15 HAROLD KLUMP,

16
17 Defendant-Appellant.

18 -----X
19 Before: McLAUGHLIN, SACK, and LIVINGSTON, Circuit Judges.

20 Appeal from a judgment of the United States District Court
21 for the Western District of New York (Arcara, C.J.), convicting
22 defendant, after a jury trial, of manufacturing marijuana,
23 possessing with the intent to sell marijuana, and possessing a
24 firearm in furtherance of a drug-trafficking crime.

25 AFFIRMED.

26 MONICA J. RICHARDS, Assistant
27 United States Attorney (Terrance P.
28 Flynn, United States Attorney for
29 the Western District of New York),
30 Buffalo, New York, for Appellee.

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32 BRUCE R. BRYAN, ESQ., Syracuse, New
33 York, for Defendant-Appellant.
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1 McLAUGHLIN, Circuit Judge:

2 Harold Klump appeals from a judgment of conviction entered
3 on January 11, 2006, following a jury trial in the United States
4 District Court for the Western District of New York (Arcara,
5 C.J.). Klump was convicted on one count of manufacturing 1,000
6 or more marijuana plants, one count of possessing with intent to
7 distribute 1,000 or more marijuana plants, and one count of
8 possessing a semiautomatic assault weapon in furtherance of a
9 drug-trafficking crime. He was sentenced to two concurrent terms
10 of 240 months' imprisonment on the drug counts and a consecutive
11 term of 120 months' imprisonment on the gun count.

12 On appeal, Klump contests the denial of his pretrial motion
13 to suppress evidence seized pursuant to a search warrant. He
14 argues that the warrant was invalid because it was based on (1)
15 evidence of criminal activity observed during an illegal
16 warrantless search of his warehouse, and (2) an affidavit that
17 contained several material misstatements and omitted critical
18 information. Klump also challenges his sentence on the gun count
19 because it was imposed pursuant to a statute that had expired by
20 the time he was sentenced.

21 We agree with the district court that exigent circumstances
22 justified the warrantless entry into the warehouse, and that the
23 search warrant affidavit contained no material misstatements or

1 omitted material information. We also find that the district
2 court properly sentenced Klump on the gun count. Accordingly, we
3 affirm.

4 **BACKGROUND**

5 In October 2002, Drug Enforcement Administration ("DEA")
6 Task Force Agent Cory Higgins executed an affidavit in support of
7 a warrant to search a warehouse located at 900 Genesee Street in
8 Buffalo, New York. The affidavit set forth the following
9 information.

10 While surveilling the home of Jeremy Page in connection with
11 an on-going narcotics investigation, DEA agents saw a white van,
12 driven by someone agents believed to be Harold Klump, arrive and
13 pick up Page. Acting on information that Page's employer drove a
14 white van and ran a large marijuana-growing operation somewhere
15 on the east side of Buffalo, the agents followed the van to Home
16 Depot. There, the suspects bought PVC plumbing pipe, which is
17 commonly used to grow marijuana. They then drove to a warehouse
18 located at 900 Genesee Street, which, according to City of
19 Buffalo tax records, was owned by Klump. The suspects carried
20 the PVC pipe into the warehouse.

21 The agents surveilled the warehouse for the next several
22 hours. During this time, the agents stopped a van shortly after
23 it left the warehouse when the driver failed to signal at a

1 nearby intersection. They saw several marijuana leaves on the
2 driver's side floor. The agents later stopped another vehicle as
3 it left the warehouse and detected a strong smell of marijuana.
4 They searched the driver and found a quarter pound of marijuana.

5 Klump and Page left the warehouse at around 2:35 pm and were
6 stopped by DEA agents. The agents then smelled smoke coming from
7 the warehouse and called the fire department. Aware that there
8 were two guard dogs inside, the agents accompanied the firemen
9 into the building. While inside, the agents saw approximately
10 300 marijuana plants and a handgun.

11 Later that day, on the basis of DEA Agent Higgins's
12 affidavit described above, a Magistrate Judge signed a warrant
13 authorizing agents to search the warehouse. Pursuant to the
14 search, agents seized 1,044 marijuana plants and a semiautomatic
15 Mack 11 carbine rifle.

16 In February 2003, Klump was charged with: (1) manufacturing
17 over 1,000 marijuana plants in violation of 21 U.S.C. § 841(a)(1)
18 and (b)(1)(A); (2) possessing with intent to distribute over
19 1,000 marijuana plants in violation of 21 U.S.C. § 841(a)(1) and
20 (b)(1)(A); and (3) possessing a semiautomatic assault weapon in
21 furtherance of a drug-trafficking crime in violation of 18 U.S.C.
22 § 924(c)(1)(A) and (c)(1)(B)(i).

1 Klump moved to suppress the evidence obtained pursuant to
2 the search warrant. He argued that the warrant was invalid
3 because it was based on observations made by DEA agents during an
4 illegal warrantless search of the warehouse. Klump also alleged
5 that the search warrant affidavit omitted critical information
6 relevant to the issue of probable cause, including that (1) no
7 fire was ultimately discovered at the warehouse, and (2) one of
8 the men whom the agents stopped as he left the warehouse told the
9 agents there was construction going on inside, which provided a
10 perfectly innocent reason for the purchase of the PVC pipe.

11 In October 2003, a Magistrate Judge held a hearing on
12 Klump's motion to suppress. The Buffalo Fire Department
13 Battalion Chief, William Cunningham, who responded to the call
14 about the smell at the warehouse, testified that, shortly after
15 arriving, the agents told him they were conducting a narcotics
16 investigation and thought that their suspects might be destroying
17 evidence. Cunningham saw no smoke or fire, but smelled what he
18 described as a "half electrical, half oily . . . kind of sweet .
19 . . smell . . . that was coming out of the top of the building."
20 According to Cunningham, "it was hard to tell exactly what it
21 was, but it definitely had an odor of something burning." He
22 also stated that, over the course of his twenty-eight year
23 career, he had encountered "really major fire[s]" that were

1 contained entirely inside of a building, and where there was
2 "just an odor" and very little or no smoke outside.

3 Cunningham testified that he entered the warehouse to
4 investigate the odor. The DEA agents accompanied the
5 firefighters inside and subdued the two pit bulls that were
6 guarding the entrance. The firefighters and the agents then
7 inspected all three floors of the warehouse but found no smoke or
8 fire.

9 DEA Special Agent Dale Kasprzyk, the law enforcement
10 supervisor on the scene, testified that the agents accompanied
11 the firefighters into the building because of concerns for the
12 firefighters' safety. In his experience, marijuana-growing
13 operations were often booby-trapped or otherwise protected in
14 ways that could have posed a danger to the firefighters.

15 William Donovan, a City of Buffalo police officer assigned
16 to the DEA, entered the warehouse with the firefighters. Donovan
17 testified that he saw numerous marijuana plants and a handgun
18 while inspecting a room on the first floor, but did not touch or
19 otherwise remove anything. After the fire inspection was
20 complete, all fire and law enforcement personnel left the
21 warehouse, and the agents secured the building to await a search
22 warrant. While the agents waited, Page informed them that the
23 odor could be from a furnace he had lit.

1 In February 2004, the Magistrate Judge recommended denial of
2 the motion to suppress. He concluded that the firefighters and
3 agents were justified in entering the warehouse to investigate
4 the source of the smell, that the scope of the search was
5 commensurate with the exigency, and that the evidence observed by
6 the agents in plain view while inside was properly included in
7 the search warrant affidavit. He also found that the affidavit
8 was not misleading.

9 In May 2004, the district court adopted the Magistrate
10 Judge's recommendation, over Klump's objections.

11 During Klump's jury trial, there was testimony that,
12 contrary to what the affidavit stated, Klump was not the person
13 who picked Page up at his home on the day in question, and the
14 DEA agents saw only one marijuana leaf in the van that was
15 stopped soon after leaving the warehouse. There was also
16 testimony that workers were repairing a water pump and a water-
17 damaged floor in the warehouse at the time of the search. The
18 jury convicted Klump of all charges.

19 At sentencing, Klump argued that the ten-year mandatory
20 minimum sentence on the gun count mandated by 18 U.S.C.
21 § 924(c) (1) (B) (i) for possessing a semiautomatic assault weapon
22 in furtherance of a drug-trafficking crime did not apply to him.
23 He contended that this provision, though operative when he

1 committed the offense and when he was convicted, was inapplicable
2 because it had expired fifteen months before sentencing. The
3 district court rejected Klump's argument, and sentenced him to
4 two concurrent terms of 240 months' imprisonment on the drug
5 counts, and a consecutive term of 120 months' imprisonment on the
6 gun count.

7 DISCUSSION

8 Klump makes two arguments: (1) the district court erred in
9 denying his pretrial motion to suppress, and (2) the district
10 court improperly sentenced him pursuant to 18 U.S.C. §
11 924(c) (1) (B) (i) on the gun possession charge. We reject both
12 arguments.

13 I. The Motion to Suppress

14 Klump challenges the district court's determination that
15 exigent circumstances supported the initial warrantless entry
16 into the warehouse, and that the search warrant affidavit did not
17 contain material misstatements or omit material information.

18 A. Exigent Circumstances

19 Exigent circumstances provide an exception to the Fourth
20 Amendment's warrant requirement. Coolidge v. New Hampshire, 403
21 U.S. 443, 474-75 (1971). "A district court's determination as to
22 whether exigent circumstances existed is fact-specific, and will
23 not be reversed on appeal unless clearly erroneous." United

1 States v. MacDonald, 916 F.2d 766, 769 (2d Cir. 1990) (en banc).

2 This standard requires us to uphold the ruling of the court below
3 unless we are "left with the definite and firm conviction that a
4 mistake has been committed." United States v. Iodice, 525 F.3d
5 179, 185 (2d Cir. 2008) (internal citation and quotation marks
6 omitted).

7 The test to determine whether exigent circumstances exist
8 "is an objective one that turns on . . . the totality of the
9 circumstances confronting law enforcement agents in the
10 particular case." MacDonald, 916 F.2d at 769. The core question
11 is whether the facts, as they appeared at the moment of entry,
12 would lead a reasonable, experienced officer, see United States
13 v. Zabare, 871 F.2d 282, 291, 292 (2d Cir. 1989), to believe that
14 there was an "urgent need to render aid or take action,"
15 MacDonald, 916 F.2d at 769 (internal quotation marks omitted).
16 "A burning building clearly presents an exigency of sufficient
17 proportions to render a warrantless entry 'reasonable.'" Michigan v. Tyler,
18 436 U.S. 499, 509 (1978).

19 The presence of exigent circumstances, of course, does not
20 give government officials unfettered license to conduct a
21 generalized search for evidence of criminal activity. Rather,
22 the warrantless search "must be strictly circumscribed by the
23 exigencies which justify its initiation." Mincey v. Arizona, 437

1 U.S. 385, 393 (1978) (internal citation and quotation marks
2 omitted). Where officials enter private property to fight a
3 fire, therefore, the scope of the warrantless search is limited
4 to that reasonably necessary to extinguish the blaze, determine
5 the cause and origin of a fire, and ensure against rekindling.
6 See Michigan v. Clifford, 464 U.S. 287, 293 (1984). However, any
7 contraband or other evidence of a crime seen in plain view during
8 such a circumscribed search may be used to establish probable
9 cause to obtain a warrant to conduct a broader search. See id.
10 at 294.

11 Applying these standards, we find no clear error in the
12 district court's determination that the firefighters and agents
13 reasonably believed it was necessary to enter the warehouse.
14 Upon arrival, the fire chief smelled what he described as a "half
15 electrical, half oily . . . kind of sweet" smell that "definitely
16 had an odor of something burning." Having been to major fires in
17 buildings where there was very little or no smoke outside, just
18 an odor, the fire chief decided, in his professional judgment,
19 that it was necessary to enter the warehouse and investigate the
20 cause of the odor.

21 Under these circumstances, the firefighters had an
22 objectively reasonable basis for believing that there was a fire
23 inside the warehouse. Nothing in the Fourth Amendment required

1 them to wait until they saw actual smoke or flames to enter a
2 building that they reasonably believed might be on fire. Cf.
3 Brigham City v. Stuart, 547 U.S. 398, 406 (2006) (holding that
4 the Fourth Amendment does not require police "to wait until
5 another blow render[s] someone 'unconscious' or 'semi-conscious'
6 or worse before entering").

7 Nor is it relevant that no fire or smoke was found. The
8 objective standard for assessing reasonableness focuses on what
9 the facts, as they appeared at the moment of entry, would lead a
10 reasonable, experienced officer to believe. See Zabare, 871 F.2d
11 at 292. It does not permit a court to evaluate the officer's
12 belief on the basis of hindsight. See id.

13 Klump maintains that the warrantless entry was unreasonable
14 because the firefighters and agents entered the warehouse to look
15 for evidence of a crime, not to respond to a legitimate exigency.
16 As Klump concedes, however, the Supreme Court has made clear that
17 the subjective intent of government agents is irrelevant to
18 determining whether a particular search was reasonable under the
19 Fourth Amendment. See, e.g., Brigham, 547 U.S. at 404-05 (citing
20 cases). Rather, "[a]n action is 'reasonable' under the Fourth
21 Amendment, regardless of the individual officer's state of mind,
22 'as long as the circumstances, viewed objectively, justify [the]
23 action.'" Id. at 404 (alteration in original) (quoting Scott v.

1 United States, 436 U.S. 128, 138 (1978)). Thus, even if the
2 agents' subjective motives in entering the warehouse could "be so
3 neatly unraveled," id. at 405, they simply do not matter. Klump
4 argues that this rule should not apply where the threat is to
5 property or evidence, rather than life or limb. He offers no
6 principled reason to adopt this distinction, however, and we can
7 conceive of none.

8 We also reject Klump's assertion that the scope of the
9 search exceeded the exigency. He asserts that the firefighters
10 and agents had no reason to search the first and second floors of
11 the warehouse because the burning smell appeared to originate
12 from the top of the building. He contends that the firefighters
13 and agents should have proceeded directly to the third floor and,
14 having found no fire or smoke there, immediately left the
15 warehouse. We disagree. Under the totality of the
16 circumstances, the firefighters acted reasonably in searching all
17 three floors to locate the source of the burning smell and
18 determine whether the warehouse was on fire. Indeed, "the
19 exigencies of the situation made that course imperative." Warden
20 v. Hayden, 387 U.S. 294, 298 (1967) (internal citation and
21 quotation marks omitted).

22 Accordingly, because the firefighters and DEA agents were
23 legally within the warehouse, observation of the marijuana and

1 handgun in plain view properly served as the basis for the
2 subsequent search warrant.

3 B. Material Misstatements and Omissions

4 We review de novo whether alleged misstatements or omissions
5 in a search warrant affidavit render the warrant invalid. See
6 United States v. Canfield, 212 F.3d 713, 717 (2d Cir. 2000).

7 A search warrant affidavit is presumed reliable. Franks v.
8 Delaware, 438 U.S. 154, 171 (1978). "In certain circumstances,
9 however, a defendant may challenge the truthfulness of factual
10 statements made in the affidavit, and thereby undermine the
11 validity of the warrant and the resulting search or seizure."
12 United States v. Awadallah, 349 F.3d 42, 64 (2d Cir. 2003). To
13 void the warrant and suppress the evidence based on a defective
14 affidavit, the defendant must demonstrate, by a preponderance of
15 the evidence, that there were intentional and material
16 misstatements or omissions in the search warrant affidavit. Id.

17 A misstatement or omission is material if it is "necessary
18 to the [issuing] judge's probable cause finding." Canfield, 212
19 F.3d at 718 (internal citation and quotation marks omitted). To
20 determine materiality, we "disregard the allegedly false
21 statements and determine whether the remaining portions of the
22 affidavit would support probable cause to issue the warrant."
23 Id. (internal citation and quotation marks omitted). If the

1 emended affidavit supports probable cause, the inaccuracies were
2 not material and suppression is not warranted. Id.

3 In determining whether there is probable cause, our task is
4 "simply to make a practical, common-sense decision whether, given
5 all the circumstances set forth in the affidavit[,] . . . there
6 is a fair probability that contraband or evidence of a crime will
7 be found in a particular place." Illinois v. Gates, 462 U.S.
8 213, 238 (1983).

9 Here, Klump isolates five misstatements or omissions in the
10 affidavit that he believes render it misleading: (1) the agents
11 "smelled smoke" rather than just an "odor"; (2) Klump picked Page
12 up from his house and bought the PVC pipe, when it was actually
13 not Klump; (3) the agents saw marijuana leaves in the van they
14 stopped, instead of just one leaf; (4) the men stopped after
15 leaving the warehouse did not mention there was a fire inside;
16 and (5) there was construction going on at the warehouse, which
17 provided an innocent reason for the purchase of the PVC pipe.

18 We first note that Klump failed to mention his first four
19 challenges in the district court. It is well-settled that "the
20 failure to assert a particular ground in a pre-trial suppression
21 motion operates as a waiver of the right to challenge the
22 subsequent admission of evidence on that ground." United States
23 v. Schwartz, 535 F.2d 160, 163 (2d Cir. 1976). This oversight

1 will be excused only "for good cause." Fed. R. Crim. P. 12(e).
2 Klump had ample opportunity to raise these challenges in the
3 district court, and has not established a reasonable excuse for
4 his failure to do so. Moreover, even if Klump had not waived
5 these arguments, we would reach the same result. None of the
6 alleged misstatements or omissions in the affidavit draw the
7 reasonableness of the initial warrantless entry into question.
8 That entry lead to the plain-sight discovery of a handgun and
9 large amounts of marijuana. This discovery was described in the
10 affidavit and was sufficient by itself, regardless of the
11 misstatements and omissions alleged by Klump, to support a
12 finding of probable cause to search the warehouse further. See
13 Canfield, 212 F.3d at 719.

14 The failure to state in the affidavit that there was ongoing
15 construction at the warehouse was likewise immaterial. "The fact
16 that an innocent explanation may be consistent with the facts
17 alleged . . . does not negate probable cause." United States v.
18 Fama, 758 F.2d 834, 838 (2d Cir. 1985). Given the agent's sworn
19 statement that PVC pipe is often used to grow marijuana, which
20 Klump does not dispute, the warrant likely would have issued even
21 if the magistrate had been apprised of the construction. Thus,
22 this omission was not material.

23 Accordingly, the search warrant was valid.

1 II. The Sentence

2 Klump challenges the district court's imposition of a ten-
3 year mandatory minimum sentence on the gun possession count under
4 § 924(c)(1)(B)(i) because that statute had expired, pursuant to a
5 sunset provision, before he was sentenced. Instead, according to
6 Klump, the district court should have imposed the five-year
7 mandatory minimum sentence mandated by the version of § 924(c) in
8 effect at the time he was sentenced. We review such legal
9 challenges de novo, United States v. Smith, 354 F.3d 171, 172 (2d
10 Cir. 2003), and conclude that the district court properly
11 sentenced Klump.

12 Under the current version of 18 U.S.C. § 924(c), "any person
13 who, during and in relation to any . . . drug trafficking crime
14 . . . uses or carries a firearm, or who, in furtherance of any
15 such crime, possesses a firearm, shall . . . be sentenced to a
16 term of imprisonment of not less than 5 years." Before September
17 2004, 18 U.S.C. § 924(c)(1)(B)(i) (2004) mandated a ten-year
18 mandatory minimum sentence "if the firearm possessed by a person
19 convicted of a violation of this subsection . . . is a . . .
20 semiautomatic assault weapon."

21 The older version of § 924(c)(1)(B)(i) applies to Klump even
22 though it had expired before he was sentenced. Pursuant to 1
23 U.S.C. § 109, "[t]he expiration of a . . . statute shall not have

1 the effect to release or extinguish any penalty . . . incurred
2 under such statute, unless the . . . statute shall so expressly
3 provide." Section 924(c)(1)(B)(i) contains no provision
4 expressly prohibiting its application to defendants, like Klump,
5 who were convicted of possessing a semiautomatic assault weapon
6 before the statute expired. Thus, the district court properly
7 sentenced him to the ten-year mandatory minimum sentence called
8 for by the statute.

9 **CONCLUSION**

10 For the foregoing reasons, we AFFIRM the judgment of the
11 district court.

12

13